SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 603

THE UNITED STATES OF AMERICA, PETITIONER

vs.

JAMES A. MACK AND CONCORD CASUALTY AND SURETY COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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1 In United States District Court, Eastern District of New York

UNITED STATES OF AMERICA, PLAINTIFF

vs.

JAMES A. MACK AND CONCORD CASUALTY AND SURETY COMPANY, DEFENDANTS

Statement pursuant to rule 13

On July 31st, 1930, the collector of customs seized the American motor boat "Wanda" with her cargo of intoxicating liquors and apprehended the two members of her crew. Subsequently the "Wanda" was released to the defendant, James A. Mack, herein upon his filing a bond with the collector of customs, pursuant to section 26 of the National Prohibition Act, in the sum of twenty-two hundred ($2200) dollars, a copy of which is annexed to the complaint. Thereafter the members of the crew pleaded guilty to an indictment charging them with transportation and possession of intoxicating liquors in violation of the National Prohibition Act. The defendant, James A. Mack, principal upon the aforesaid bond, failed to return the vessel to the custody of the collector of customs on the day that the crew pleaded guilty to the indictment and were duly sentenced.

On July 19th, 1933, the United States of America filed its
2 bill of complaint to recover upon the aforesaid bond. No answer was interposed by the defendant, James A. Mack. On April 13th, 1934, defendant, James A. Mack, moved to dismiss the complaint herein. On April 25th, 1934, the motion was argued before Honorable Mortimer W. Byers, United States district judge for the eastern district of New York. On May 7th, 1934, Judge Byers rendered a decision granting the motion to dismiss. On May 21, 1934, an order was entered granting the motion to dismiss and directing judgment for the defendant, James A. Mack. On May 23, 1934, the United States filed its notice of appeal, order allowing appeal and assignment of errors. On May 24th, 1934, the citation on appeal was filed in the clerk's office.

The attorneys are:

Louis Halle, office and post-office address, 152 West 42nd Street, New York City, representing the defendant, James A. Mack.

The United States attorney, Howard W. Ameli, appeared by Alfred C. McKenzie, Esq., assistant United States attorney, of counsel, for the Government.

3 In United States District Court, Eastern District of New York

[Title omitted.]

Docket entries

July 19, 1933—Bill of complaint and requisition for summons filed. Summons issued.
July 28, " —Summons returned and filed—Served on defendant—Concord Casualty and Surety Company.
Aug. 25, " —Answer defendant surety filed.
Apr. 13, 1934—Notice of motion filed to dismiss, etc.
Apr. 18, " —Before Byers, J. Hearing on motion to dismiss adjourned to April 25, 1934.
Apr. 25, " —Before Byers, J. Hearing on motion to dismiss argued. Decision reserved—submit May 2, 1934.
May 7, " —By Byers, J. Decision rendered granting motion to dismiss. Settle order.
4 May 21, " —By Byers, J. Order filed and entered dismissing cause without costs.
May 23, " —Notice of appeal, order allowing appeal and assignment of errors filed.
May 24, " —Citation filed.

In United States District Court, Eastern District of New York

[Title omitted.]

Complaint

The plaintiff, United States of America, by Howard W. Ameli, United States attorney for the eastern district of New York, complaining of the defendants herein, respectfully shows to this court and alleges upon information and belief as follows:

First. That at all times hereinafter mentioned, the plaintiff was and still is a sovereign power.

5 Second. That the defendant, James A. Mack, is a resident of Wantagh, Long Island, and that the Concord Casualty & Surety Company was and is a corporation duly organized and existing under the laws of the State of New York.

Third. That on or about the 31st day of July 1930, the collector of customs for the Port of New York apprehended one, Hillary Cathell and Adrian Van Austin, and seized the American motor boat "Wanda" with a cargo of intoxicating liquors for violation of the laws of the United States of America.

By virtue of said arrest, said Hillary Cathell and Adrian Van Austin in connection with the seizure of the American motor boat "Wanda", said persons were duly indicted by the Federal grand jury for the eastern district of New York for the offenses of transportation and possession of intoxicating liquors in violation of the National Prohibition Act.

On or about January 26th, 1931, said Hillary Cathell and Adrian Van Austin pleaded guilty to the charge of possession of intoxicating

liquors and were duly sentenced therefor, and that said possession of intoxicating liquors by said persons was incidental to transportation of said liquors on board the American motor boat "Wanda."

Fourth. That heretofore and on or about the 31st day of October 1930, the defendants herein duly made, executed, and delivered their certain bond in writing to the plaintiff, by which the said defendant James A. Mack as a principal, and the said Concord Casualty
6 & Surety Company as surety, did bind themselves to the plaintiff in the sum of two thousand two hundred ($2,200) dollars, a copy of which bond is hereto attached and made a part of this complaint, and market "Exhibit A."

Fifth. That the condition of said bond was such that if the said principal, the defendant herein, shall return the American motor boat "Wanda" to the custody of the assistant collector of customs for the Port of New York, the officer approving said bond, on the day of the criminal trial of the aforesaid persons apprehended at the time of the sizure of said vessel to abide the judgment of the court, then said obligation to be void, otherwise to remain in full force and effect.

Sixth. That the said principal, James A. Mack, utterly failed and neglected and refused to return said American motor boat "Wanda" to the officer approving the aforesaid bond on the 26th day of January 1931, or on any day since the first day of November 1930, although duly obligated to do so pursuant to the terms of the aforesaid bond.

Seventh. That by reason of the failure of said defendant, James A. Mack, to fulfill the terms and conditions of the aforesaid bond and to return the aforesaid vessel to the custody of the officer approving the aforesaid bond on the day of the criminal trial of the aforesaid persons apprehended at the time of the seizure of said
7 vessel, the terms and conditions of said bond became breached and there is now due and owing by the defendants herein to the plaintiff on account thereof the sum of eleven hundred ($1,100.00) dollars with interest from the 26th day of January 1931.

Wherefore, plaintiff demands judgment against the defendants herein in the sum of eleven hundred ($1,100.00) dollars with interest thereon from the 26th day of January 1931, together with the costs and disbursements of this action.

HOWARD W. AMELI,
United States Attorney,
Eastern District of New York,
523 United States Court House, Brooklyn, New York.

ALFRED C. MCKENZIE,
Assistant U. S. Attorney,
Of Counsel.

[*Duly sworn to by Alfred C. McKenzie, jurat omitted in printing.*]

Exhibit A to complaint

BOND

TREASURY DEPARTMENT,
BUREAU OF INTERNAL REVENUE.
Bond No. 10,433.

BOND FOR RELEASE OF VEHICLE OR CONVEYANCE SEIZED UNDER SECTION 26 OF TITLE II OF THE NATIONAL PROHIBITION ACT OF OCTOBER 28, 1919

Know all men by these presents, that I, James A. Mack, of No. 4 Hickory Street, Wantagh, Long Island, N. Y., principal and Concord Casualty and Surety Company, of No. 60 John Street, New York City, a corporation, organized and existing under laws of New York State, surety, are held and firmly bound unto the United States of America in the penal sum of two thousand two hundred and 00/100 ($2,200.00) dollars (double the value of the vehicle or conveyance), money of the United States, for the payment of which well and truly to be made we bind ourselves jointly and severally, our heirs, executors, administrators, successors, and assigns firmly by these presents.

Whereas, the following described vehicle or conveyance has been seized pursuant to section 26 of title II of the National Prohibition Act, to wit: The American motor boat "Wanda."

And, whereas, the aforesaid principal has made application for the return of said vehicle or conveyance, claiming to be the owner thereof:

Now, therefore, the condition of this obligation or bond is such, that if the said principal shall return the aforesaid conveyance or vehicle to the custody of the officer approving this bond on the day of the criminal trial to abide the judgment of the court; and, in case the said property shall be forfeited to the United States, or the court shall order a sale of said conveyance or vehicle, that if the said principal shall pay the difference between the value of said vehicle or conveyance at the time of the execution hereof, which is hereby stipulated to be one-half of the penal sum of this bond, and its value on the date of its return as aforesaid, less depreciation due to reasonable wear and tear of ordinary use, and the said principal shall pay off any liens or encumbrances thereon except the following liens heretofore existing, namely: then this obligation to be void, otherwise to remain in full force and effect.

Witness our hands and seals this 31st day of October 1930;

By (Sgd.) JAMES A. MACK,
Principal, Concord Casualty and Surety Company.
By (Sgd.) JOHN A. MANNING,
Resident Vice President.

Attest:

(Sgd.) FRED M. NIELSEN,
Attorney in fact.

Approved this 1st day of November 1930.

(Sgd.) H. C. STUART,
Assistant Collector
(Title of Approving Officer).

Witness our hands and seals this 31st day of October 1930;
(Sgd.) LILLIAN DOWD.
(Sgd.) M. M. JUDGE.

11 In United States District Court, Eastern District of New York

[Title omitted.]

Notice of motion to dismiss

SIR: Please take notice, that upon the annexed affidavit of Milton R. Kroopf, duly verified the 12th day of April 1934, a motion will be made at a motion term of this court to be held in and for the eastern district of New York, at the Post Office Building, Washington and Johnson Streets, Borough of Brooklyn, city of New York, on the 18th day of April 1934, at 10:30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order dismissing the above-entitled cause, and for such other and further relief as to this court may deem just and proper.

Dated, N. Y., April 12th, 1934.

Yours, &c.,

LOUIS HALLE,
Attorney for Defendant Mack,
Office and P. O. address, 152 W. 42nd Street,
Borough of Manhattan, city of New York.

To HOWARD W. AMELI,
United States Attorney,
Eastern District of New York.

12 In United States District Court, Eastern District of New York

[Title omitted.]

Affidavit of Milton R. Kroopf in support of motion

CITY OF NEW YORK,
County of New York,
State of New York, ss:

Milton R. Kroopf, being duly sworn, deposes and says: I am an attorney associated with Louis Halle, the attorney for James A. Mack.

That the bond upon which suit was brought in the instant case is a statutory bond given under and pursuant to sections 3 and 26 of the National Prohibition Act.

That the said bond was given in lieu of the American motor boat "Wanda", which was seized for violation of the National Prohibition Act, and held for forfeiture by reason of the said violation.

That the statute under which the said bond was given has become inoperative by virtue of the repeal of the eighteenth amendment of the Constitution. The United States Supreme Court held
13 that all penalties incurred under the National Prohibition Act was released and extinguished by the said repeal and adoption of the twenty-first amendment to the Constitution.

Wherefore it is respectfully prayed that the above entitled case be dismissed.

MILTON R. KROOPF.

Sworn to before me this 12th day of April 1934.

[SEAL] GUSTAVE HALLE,
Notary Public.

Kings Co. Clerk's No. 101, Reg. No. 6096.
Cert. filed in N. Y. Co. No. 242, Reg. No. 6H127.
Commission expires March 30, 1936.

14 In United States District Court, Eastern District of New York

L.—5892

UNITED STATES OF AMERICA, PLAINTIFF

vs.

JAMES A. MACK AND CONCORD CASUALTY & SURETY COMPANY, DEFENDANTS

Howard W. Ameli, Esq., United States attorney, for plaintiff (Alfred C. McKenzie, Esq., asst. U. S. attorney, of counsel).

Louis Halle, Esq., attorney for defendant, Mack (Milton R. Kroopf, Esq., of counsel).

Opinion

MAY 7, 1934.

BYERS, D. J.: Motion for an order of dismissal, made by the surety upon a bond given November 1, 1930, for release of a vessel seized under section 26 of the National Prohibition Act (28 U. S. C., sec. 40).

The undisputed facts are that on July 31, 1930, the collector of customs of this port arrested Cathell and Van Austin, and seized the motor boat "Wanda" while intoxicating liquors were being transported by the former two on the vessel.

On October 31, 1930, the owner of the "Wanda" and the de-
15 fendants above named executed a bond for the release of the vessel, conditioned upon the return thereof on the day of the criminal trial of the individuals so arrested, and the bond having been approved, that vessel was released.

Cathell and Van Austin, having been indicted, appeared in this court on January 26, 1931, pleaded guilty to possession of intoxicating liquors incidental to transportation, and were sentenced.

The vessel was not then produced; nor was it at any time thereafter.

Action was brought at law upon the bond, the complaint having been filed on July 19, 1933, almost two and one-half years after the termination of the criminal proceeding.

There was nothing impetuous about that.

Answer was filed on August 25, 1933, which in effect merely put the Government to formal proof.

The defendant now seeks dismissal because of the repeal of the prohibition law, the argument being that the bond was cancelled in effect by the adoption of the 21st amendment.

If no bond had been given, the vessel would have been subject to forfeiture when the individuals pleaded guilty to the indictment, under the terms of the statute; or the forfeiture could have been sought as the result of a libel filed for that purpose. The Harbour Trader, 42 Fed. (2d) 858.

The forfeiture in either case would have been the result of judicial action independent of the judgment in the criminal cause. No such forfeiture has been had, and could not now be granted; nor could it have been after the effective date of the 21st amendment. U. S. v. Chambers and Gibson, No. 659, October, 1933 term, U. S. Sup. Court.

16 If this is so, it seems to be eqhally true that no judgment upon the bond which was given as bail for the vessel's return to the custody of the seizing officer, can be entered, for otherwise the surety could be held while the res could not.

Motion granted. Settle order.

M. W. B., U. S. D. J.

In United States District Court

[Title omitted.]

Order granting motion to dismiss

May 21, 1934

A motion having come on to be heard before me this 25th day of April 1934, for an order dismissing the complaint in the
17 above entitled cause, now after reading and filing the notice of motion, dated April 12th, 1934, and the affidavit of Milton

R. Kroopf, duly verified the 12th day of April 1934, in support thereof, and after hearing Louis Halle, attorney for the defendant, in support of said motion, by Milton R. Kroopf, Esq., of counsel, and Howard W. Ameli, Esq., United States attorney, by Alfred McKenzie, Esq., of counsel in opposition thereto, and due deliberation having been had thereon, and an opinion having been duly rendered and filed May 7th, 1934, it is hereby

Ordered, that the motion to dismiss the complaint be, and the same hereby is, in all respects granted, and it is

Further ordered, that judgment for the defendant be entered without costs.

MORTIMER W. BYERS,
U. S. D. J.

18 In United States District Court, Eastern District of New York

[Title omitted.]

Notice of appeal and order allowing appeal

The United States of America, feeling itself aggrieved by the final order entered on the 21st day of May 1934, in the above-entitled cause, does hereby appeal from the said order to the United States Circuit Court of Appeals for the Second Circuit for the reasons specified in the assignment of errors, which is filed herein, and it prays that this appeal may be allowed and that citation issue as provided by law, and that a transcript of the records, proceedings, and papers upon which said final order was based, duly authenticated, may be transmitted to the United States Circuit Court of Appeals for the Second Circuit.

Dated, Brooklyn, New York, May 23rd, 1934.

Yours, etc.,

HOWARD W. AMELI,
United States Attorney,
Eastern District of New York,
523 United States Court House, Brooklyn, New York.

19 To LOUIS HALLE, Esq.,
Attorney for Defendant Mack,
162 West 42nd Street, New York City.

Clerk of the United States District Court for the Eastern District of New York.

The above appeal is hereby allowed.

Dated, Brooklyn, New York, May 23rd, 1934.

MORTIMER W. BYERS,
U. S. D. J.

In United States District Court, Eastern District of New York

[Title omitted.]

Assignments of error

Now, comes the United States of America, and assigns error in the rulings and proceedings of the District Court herein, as follows:

20 1. The court erred in granting the motion of the defendant, James A. Mack, for an order dismissing the complaint herein.

2. The court erred in entering the order dated May 21st, 1934, herein dismissing the complaint and further ordering that judgment for the defendant be entered.

3. The court erred in holding that if no bond had been given, the forfeiture of the vessel would have been the result of judicial action independent of the judgment in the criminal cause.

4. The court erred in holding that if no bond had been given, forfeiture of the vessel could not now be granted nor could it have been after the effective date of the twenty-first amendment.

5. The court erred in holding that "it seems to be equally true that no judgment upon the bond which was given as bail for the vessel's return to the custody of the seizing officer, can be entered, for otherwise the surety could be held while the res could not."

6. The court erred in not holding that when the defendant, James A. Mack, failed to return the vessel to the collector of customs on the day that the crew thereof pleaded guilty to the indictment, the terms and conditions of the bond became breached and the Government's right to forfeiture and to judgment upon said bond became vested.

7. The court erred in not holding that the right of action of
21 the United States of America upon the bond given for the release of the vessel "Wanda" stands independent of any statute.

8. The court erred in not holding that when the defendant, James A. Mack, failed to return the vessel "Wanda" to the collector of customs on the day that the crew pleaded guilty to the indictment, that a right of action in behalf of the United States of America arose upon said bond and that nothing further remained to be done except forfeiture thereof and entering judgment thereon.

Wherefore, the United States of America, appellant, prays that the aforesaid order may be reversed and that it have such other and further releief as may be just and proper in the premises.

Dated, Brooklyn, New York, May 23rd, 1934.

HOWARD W. AMELI,
United States Attorney, Eastern District of New York,
Proctor for Appellant,
523 United States Court House, Brooklyn, New York.

22 [Citation in usual form omitted in printing.]

In United States District Court, Eastern District of New York

[Title omitted.]

23 *Stipulation re record*

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of said District Court in the above-entitled matter as agreed on by the parties.

Dated, Brooklyn, New York, June 20, 1934.

LOUIS HALLE,
Attorney for defendant, James A. Mack.
LEO J. HICKEY,
United States Attorney.
By ALFRED C. MCKENZIE,
Assistant U. S. Attorney.

24 In United States District Court

Order settling record

On the consent of the attorneys for the respective parties, the foregoing printed record is hereby ordered filed in lieu of the original papers, for the purpose of certifying the record on appeal.

Dated, Brooklyn, New York, June 21, 1934.

MORTIMER W. BYERS,
U. S. D. J.

25 [Clerk's certificate to foregoing transcript omitted in printing.]

26 In United States Circuit Court of Appeals for the Second Circuit

No. 76. October term, 1934

Argued Oct. 16, 1934. Decided Nov. 5, 1934

UNITED STATES OF AMERICA, APPELLANT

vs.

JAMES A. MACK AND CONCORD CASUALTY AND SURETY COMPANY, defendants

JAMES A. MACK, APPELLEE

Appeal from a judgment of the District Court for the Eastern Eastern District of New York.

Before L. HAND, SWAN, and AUGUSTUS N. HAND, Circuit Judges.

Appeal from a judgement of the District Court for the Eastern District of New York dismissing a complaint in an action upon a bond.

Emanuel Bublick, of Brooklyn, N. Y., for the United States.

Milton R. Kroopf, of New York City, for appellees.

Opinion

L. HAND, *Circuit Judge:* The United States sued Mack and the Surety Company upon a bond executed in the form prescribed by section 26, title 2, of the National Prohibition Act (27 U. S. C. A., § 40), on the thirty-first day of October 1930. The condition read as follows: "The said principal shall return the aforesaid conveyance or vehicle to the custody of the officer approving this bond on the day of the criminal trial to abide the judgment of the court." The occasion for the bond was a seizure in the preceding July by the collector of customs of New York, of the motor boat "Wanda", with a cargo of intoxicating liquors. Those in command of the boat were arrested at the same time, and on January 26, 1931, when brought to trial, pleaded guilty to the possession of the liquor and were sentenced. Mack neglected to return the "Wanda" on "the day of the criminal trial"—January 26—or at any other time, but no proceedings to collect the bond were taken until this action was begun on July 31, 1933. On April 12, 1934, the defendants moved to dismiss the complaint on the ground that judgment could not pass on such a bond after the repeal of the eighteenth amendment, and so the court ruled, relying on U. S. v. Chambers & Gibson, 291 U. S. 217, 54 S. Ct. 434, 78 L. Ed. 763, 89 A. L. R. 1510. There are said to be many such bonds held by the Treasury; and the question has been resolved in favor of the United States in the three other cases where it has come up in District Courts. U. S. v. Beigert — F. Supp. — (D. C. N. J. July 7, 1934); U. S. v. E. & S. Transportation Co. — F. Supp. — (D. C. S. D. N. Y. June 1, 1934); U. S. v. Sohn — F. Supp. — (D. C. R. I.). The theory is that although repeal of the amendment ended all power to forfeit the boat, this action is not such a proceeding. Nothing is forfeited, no penalty is exacted; the obligee of the bond merely asks judgment upon a chose in action, now made absolute by the ending of the condition subsequent. Such a "right of action" once "vested" cannot be "divested" by the repeal of a statute or of a constitutional provision, which need not be invoked either to create or sustain it. The fact that except for the amendment the bond would not have been given, is irrelevant; it was executed for a consideration and became a contract by force of the common law alone.

This reasoning might be persuasive, if the plaintiff were
27 right that the obligation needs no support in the eighteenth amendment and depends wholly on the common law. In that event the bond became collectible at once "on the day of the crim-

inal trial", as soon as the principal defaulted in producing the boat. The condition subsequent having then lapsed, nothing stood in the way of immediate recovery; it contained nothing about the conviction of the accused smuggler; it was satisfied when the boat was not forthcoming. It is true that there was another condition, but as the two were in the conjunctive, the lapse of one made the lapse of the other unnecessary. The possibility that the bond might have been collected before conviction, if its meaning be as the plaintiff says, is by no means academic. Criminal trials are often long; bail at times becomes shaky; scire facias is a speedy remedy. A court, if urged, might well have issued the writ and passed judgment, before the prosecution came to an end. If the plaintiff be right, the bail would have had no defense. Yet he would be a hardy suitors who should say, if thereafter the prosecution failed, that he might keep the proceeds, and no court would sustain him. If so, the sovereign's continued power to confiscate must be somewhere implicit in the proceedings, and the action cannot depend wholly on the common law. It may be that the statute so infuses the bond that no action can be brought at all, and no writ of scire facias issue, until conviction; just as no decree of forfeiture can pass until then. If so, it is an answer, for it shows that a statutory penal feature has been added to the common-law consensual face; surely there is no warrant for interposing such an unexpressed condition, if conviction be merely a fact, an event legally neutral, except that it must occur. On the other hand, it may be that the bond is collectible, though the obligee must restore the proceeds if the prosecution fails. That would even more clearly betray the confiscation which lurks behind, for it would be absurd to collect the proceeds after all power to keep them disappears. Less nicely considered, it is apparent that, since the bond was a mere substitute for the arrested boat, the position of the Treasury ought not to be amended by the substitution; that the purpose in allowing the owner to secure immediate possession of his property, must be read as subjecting him to no more onerous conditions than if he had left it under arrest. Whether it be vehicle or bond, a sovereign's power to confiscate must exist; that the suit sounds in contract, that a bond is a "chose in action", cannot disguise the fundamental character of what is done.

In accord is the ancient rule that until the bail is "fixed" he will be exonerated by anything which would discharge the principal from imprisonment were he surrendered; a fortiori by anything which would excuse his surrender. Beers v. Haughton, 9 Pet. 329, 358, 9 L. Ed. 145; Kelly v. Henderson, 1 Pa., 495. He is not necessarily "fixed" by a return of non est inventus to a capias ad satisfaciendum; he may exonerate himself by a surrender until the return day of the last scire facias, when after two "nihils" judgment can be entered. Mannin v. Partridge, 14 East 599. Yet the bond is estreated upon such a return to the ca. sa., as it was here by the principal's default. The decisions relied on by the plaintiff are

quite different. Thus in Pac. Mail S. S. Co. v. Joliffe, 2 Wall. 450, 17 L. Ed. 805, the recovery was based, not on a penal, but a remedial, statute; said to create a "quasi-contract", though that term would scarcely be used to-day to describe the obligation. The right of a pilot to half fees for visiting a ship which did not accept him, was certainly not a penalty; rather it was to compensate him for services thought beneficial to ships in the long run. Coombes v. Getz, 285 U. S. 434, 52 S. Ct. 435, 76 L. Ed. 866, turned upon a construction of the Constitution of California by which the liability of directors was held to be contractual. In Ettor v. Tacoma, 228 U. S. 148, 33 S. Ct. 428, 57 L. Ed. 773, the statute repealed was compensatory. In White v. Hart, 13 Wall. 646, 20 L. Ed. 685, and Osborn v. Nicholson, 13 Wall. 654, 20 L. Ed. 689, the buyers of slaves, when sued for the price, set up emancipation as a defence. No more was determined than the liability of a buyer upon failure of title after performance. Our decision in U. S. v. Randall, 58 F. (2d) 193, held only that recovery upon a bond under section 26 should be limited to the value of the ship arrested; we did not suggest that the action was not pro tanto a forfeiture. When we said that it was intended as a substitute for the "damage" or "loss" of the United States, we spoke of the loss incurred by failing to collect the penalty, not of any loss involved in the sale or traffic in liquors. There was no such "loss"; forfeiture is a punishment.

Judgment affirmed.

28 In United States Circuit Court of Appeals, Second Circuit

UNITED STATES, PLAINTIFF-APPELLANT

vs.

JAMES A. MACK, DEFENDANT-APPELLEE

Judgment

Filed Nov. 13, 1934

Appeal from the District Court of the United States for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Eastern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be, and it hereby is, affirmed.

It is further ordered that a mandate issue to the said District Court in accordance with this decree.

WM. PARKIN, *Clerk.*

29 [File endorsement omitted].

30 [Clerk's certificate to foregoing transcript omitted in printing.]

31 Supreme Court of the United States

Order allowing certiorari

Filed March 4, 1935

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(Endorsement on cover:) File No. 39,321. U. S. Circuit Court of Appeals, Second Circuit. Term No. 693. The United States of America, petitioner, vs. James A. Mack and Concord Casualty and Surety Company. Petition for a writ of certiorari and exhibit thereto. Filed February 9, 1935. File No. 693 O. T. 1934.

U. S. GOVERNMENT PRINTING OFFICE, 1935